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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 10, 1944
CERTIORARI GRANTED DECEMBER 4, 1944

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals
For the Second Circuit

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement Under Rule 13

The above entitled proceeding was commenced by the filing of a petition in the office of the Clerk of the former United States Board of Tax Appeals on April 15, 1942. The names of the parties are given in full above, and there has been no change or substitution of parties.

The dates of service of the respective pleadings were as follows:

Petition filed April 15, 1942, served April 16, 1942.

Amended petition filed June 13, 1942, served June 17, 1942.

Answer to petition filed June 15, 1942, served June 15, 1942.

Answer to amended petition filed June 29, 1942, served June 30, 1942.

Amendment to answer to amended petition filed September 19, 1942, served September 19, 1942.

Reply to amended answer filed October 19, 1942, served October 19, 1942.

Amendment to amended petition filed February 23, 1943, served February 23, 1943.

2 There has been no arrest, bail or attachment of property in this proceeding. The proceeding was tried at New York, N. Y., on February 23, 1942, before Honorable J. Russel Leech, Judge of the Tax Court.

There has been no reference to any Commissioner or Special Master.

The decision of the Tax Court was entered June 23, 1943.

The petition for review by this Court was filed August 14, 1943.

In the Tax Court of the United States

Docket No. 110585

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of facts

Filed at hearing, New York, Feb. 23, 1943

It is hereby stipulated for the purposes of this proceeding that the following facts are true and that this stipulation may be received as conclusive evidence thereof:

1. Petitioner, Barnett Hollander, was duly appointed by the Surrogate's Court of New York County, New York,
3 executor of the Last Will and Testament of Lester Field, deceased, who died domiciled in the said County and State of New York, and that Letters Testamentary were duly issued to him as such executor by said Court on April 14th, 1941.

2. Abraham Kraditor who was appointed Temporary Administrator of the Estate of Lester Field, deceased, resigned as such Temporary Administrator and his Letters of Temporary Administration were duly revoked by order of the Surrogate's Court of New York County entered November 14th, 1940.

3. The respondent heretofore, by a notice of deficiency dated June 11, 1940, from which no appeal to this Court was taken, determined the net estate to be $236,963.28 under the Revenue Act of 1926 and $296,963.28 under the Revenue Act of 1932 as amended, which resulted in a tax liability under the Revenue Act of 1926 of $5,978.53 and a tax liability under the Revenue Act of 1932 as amended of $40,614.13; a net tax of $14,638.89 was assessed and paid on April 18, 1939, on the basis of the return filed resulting in a net deficiency of $26,570.95 which was assessed and paid on December 23, 1940. In determining the net deficiency of $26,570.95, the respondent allowed tentatively a credit for State estate taxes of $4,782.82. Evidence of the payment of taxes to the State not having been submitted, the respondent sent the notice of deficiency in the amount of $4,782.82, dated January 16, 1942, from which this appeal is taken. On the return filed by petitioner, there was included in the gross estate $150,000 on account of the trust referred to in paragraph 5 and Exhibit 1 hereof. Upon audit, the full amount of the property of this trust of the value of $307,452.82 as at the date of decedent's death was in-

cluded in the gross estate by respondent in the notice of
4 deficiency dated June 11, 1940. No claim for refund has been filed with the respondent with respect to the tax involved in this proceeding.

4. Petitioner has paid to the State of New York State estate taxes in the amount of $6,814.07 and is entitled to credit for such State estate taxes in the amount allowed by law but not exceeding said amount of $6,814.07.

5. On June 8, 1922, decedent transferred to Bankers Trust Company as trustee certain assets valued at the date of decedent's death at the sum of $307,452.82. Said assets were so transferred to be held by said Bankers Trust Company as trustee pursuant to the terms of an Indenture bearing date June 8, 1922, a copy of which is attached hereto and marked Exhibit 1.

6. A copy of the Last Will and Testament of said Lester Field, deceased, as admitted to probate by the Surrogate's Court of the County of New York is attached hereto and marked Exhibit 2 hereof.

7. Said deceased at the time of the making of said Indenture bearing date June 8, 1922, was known as Lester Rosenfield. His name was thereafter changed to Lester Field by an order of the Supreme Court of the State of New York entered in New York County.

8. Said deceased, Lester Field, never had any issue, and at the time of his death said deceased was survived by his widow, Blanche Field, his sister Ruth R. Hollander, the issue of his deceased brother Hugo Rosenfield, being two sons of said Hugo Rosenfield named John R. Field and Warren R. Field, respectively, and by Noel Ruth Hollander and Audrey Hollander Israel, referred to in said Indenture of Trust as Audrey Louise Hollander.

5 9. At the time of the death of deceased, he was a citizen of the United States, of the age of 52 years; said Noel Ruth Hollander was of the age of eighteen years; and said Audrey Hollander Israel was of the age of 25 years.

10. Said transfer in trust was not made by decedent in contemplation of death. Decedent did not at any time relinquish any power to alter, amend or revoke said transfer or to change the enjoyment of the property transferred, in contemplation of death.

11. In determining the net estate of decedent herein there was omitted from inclusion in the gross estate the amount of $3,338.36, being the difference between the correct amount and the amount included in the gross estate in the notice of deficiency from which this appeal is taken, on account of income accrued to the date of death on the trust created by the decedent on June 8, 1922 in

possession of Bankers Trust Company, and that said sum of $3,338.36 is properly includible in the gross estate of decedent.

12. The value of a remainder in the sum of $157,452.82 payable upon the death of the survivor of two females aged eighteen and twenty-five years respectively was at the time of decedent's death $24,930.76.

13. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82 payable upon the death of the survivor of two females aged eighteen and twenty-five years respectively, contingent upon his survival of both of said females, was $891.18.

EDGAR J. BERNHEIMER,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

6 *Exhibit 1, annexed to foregoing statement of facts*

This indenture of trust made, executed and entered into this 8th day of June in the year one thousand nine hundred and twenty-two, by and between Lester Rosenfield, of the Borough of Manhattan, City of New York, now residing in Paris, France, hereinafter described as the "Donor," and the Bankers Trust Company, a New York corporation, with its principal place of business at No. 16 Wall Street, in said Borough and City, hereinafter described as the "Trustee,"

Witnesseth: Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned,

Now, therefore, this indenture witnesseth, that in consideration of the premises, the mutual covenants herein contained and of other good and valuable considerations, the Donor does hereby transfer, assign, set over and entrust unto the said Trustee, its successors and assigns certain shares, securities and valuables, of which a list is hereto attached and designated Schedule A, the receipt whereof by said Trustee is hereby acknowledged, for the following uses and purposes and upon the following trust, conditions and reservations:

First: (A) During the lifetime of Audrey Louise Hollander and Noel Ruth Hollander, the daughters of Ruth Rosenfield Hollander, or their survivor, the said Trustee shall have, hold and retain the said shares, securities and valuables and any other securities, money or property that may be substituted therefor, or added thereto, or that may result from reinvestment hereunder, and shall, if convenient and desirable in its discretion, procure

7 such shares and securities to be transferred to, or regis-

tered in, its name, or in the name of its nominee, and shall collect the interests, incomes and dividends and pay over, distribute, and dispose of the same, whether interest or corpus, as follows:

(B) During the lifetime of the Donor, but not in any event after the deaths of Audrey Louise Hollander and Noel Ruth Hollander, all of said incomes, interests and dividends shall be paid over and delivered to the Donor himself in periodic payments absolutely, with the reservation and proviso, however, that all payments of whatsoever kind that may be made to or for the benefit of the Donor, or to or for the benefit of any person whatsoever named or referred to herein or hereunder, or out of or in connection with the trust and corpus herein established (but not intending to include payments to the Trustee or for the purchase of securities for capital account or for expenses), shall, during the lifetime of Isaac Rosenfield, the father of the Donor, be paid to said Isaac Rosenfield as the agent, attorney and representative of said Donor, and of such persons to whom said monies may be payable hereunder, such agency and representation being hereby declared, and shall be construed to be coupled with an interest and irrevocable excepting only if and to the extent that the same may in any case and in any amount be disaffirmed, relinquished, surrendered, delegated or substituted by the said Isaac Rosenfield; and until and unless so disaffirmed, relinquished, surrendered, delegated or substituted, the receipt of said Isaac Rosenfield during his lifetime for any and all payments either of principal or income made by the Trustee to the Donor, or any of the beneficiaries or otherwise hereunder, shall be full and complete protection and release to the Trustee,
8 and the Trustee shall in no event whatsoever have any responsibility or any duty to inquire into or see to the application or disposition of any payments or property so paid and delivered. The right of the said Isaac Rosenfield to delegate or substitute his agency and powers hereunder shall not, however, extend beyond the lifetime of the said Isaac Rosenfield.

(C) Upon the death of the Donor during the lifetime of said Audrey Louise Hollander and Noel Ruth Hollander, or their survivor, leaving him surviving any lawful issue or any widow to whom the Donor may bear the marriage relation at the time of his decease, then all of the said corpus of the trust fund hereby established, subject only to the right hereby reserved to the Donor as hereinafter more fully appears to reduce or cancel said amounts, shall be divided into separate trust funds, one of $150,000 for such surviving widow, if any, and the remainder, or the whole thereof if there should be no such surviving widow, into equal trust funds among the then surviving lawful children of the Donor or among

the then surviving lawful issue of any deceased child per stirpes and not per capita.

(D) In the event, however, that the Donor shall by his last will and testament, or any instrument duly signed, acknowledged and lodged with the Trustee, so appoint, declare and direct, then the amount that shall constitute the corpus of any trust fund shall be reduced or may be wholly abrogated and cancelled, whereupon the amounts to be divided into trust funds hereunder for the remaining lawful issue, provision for whom shall not be so reduced or abrogated by the Donor, shall be to that extent increased,
9 but in no event shall the fund set apart for any such surviving widow exceed the sum of $150,000, nor shall any amount or fund so reduced or abrogated by the Donor be increased or restored.

(E) In the event, however, that the Donor should by his last will and testament, or the instrument immediately above set forth, wholly abrogate all trusts and funds and all provisions as herein set forth for any such widow and issue, or in the event that he should by such last will or instrument so reduce the provision herein for such widow or issue that there should remain a balance of said corpus and fund undisposed of hereunder, then said entire corpus, or any such undisposed of balance, shall be paid over equally absolutely to the then surviving brother and sister of the Donor, or their then surviving lawful issue, per stirpes and not per capita.

(F) As to each such trust fund established hereunder the Trustee shall during the lifetime of Audrey Louise Hollander and Noel Ruth Hollander and their survivor have, hold and retain the shares, securities and valuables constituting the same and receive and collect the incomes, interests and dividends therefrom and pay the same over in periodic payments to each said surviving beneficiary from whom said trust and fund shall have been established or appointed, and upon the death of any such issue of the Donor or whom any such trust shall have been established or appointed, the corpus and principal of said fund so set apart for such deceased issue shall be divided and paid over equally absolutely per stirpes to and among the then surviving lawful issue of such life tenant for whom said trust shall have been established or appointed, or failing such issue then surviving to and among the then
10 surviving lawful issue of the Donor, equally absolutely per stirpes and not per capita, or if there should then be no such issue then surviving, then equally absolutely to and between the then surviving brother and sister of the Donor or their lawful issue per stirpes and not per capita.

(G) Upon the death of any such surviving widow for whom any such trust fund shall have been appointed, then the principal and

corpus of the fund so set apart for such widow shall be distributed equally absolutely among the then surviving lawful issue of the Donor per stirpes and not per capita, and in the event of the failure of any such issue then surviving, in such event, the corpus of said trust fund so set apart for the surviving widow shall be paid and divided equally absolutely to and between the surviving brother and sister of the Donor or their lawful issue then surviving per stirpes and not per capita.

(H) Upon the death of the said Audrey Louise Hollander and Noel Ruth Hollander, and their survivor, before the Donor, then the principal and corpus of said entire trust fund shall be and become the property of and shall be paid to the said Donor absolutely.

(I) Upon the death of said Audrey Louise Hollander and Noel Ruth Hollander, and their survivor, after the lifetime of the Donor but during the existence of any trust created hereunder by said Donor, or pursuant hereto, then the principal and corpus of each and any said trust so created and so existing shall be and become the property of and shall be at once paid over to the life beneficiary of each said trust absolutely.

Second: The incomes of any trusts established hereunder,
11 or pursuant hereto, if payable to a minor or otherwise, shall be paid periodically or currently as they accrue and shall not be accumulated, always subject to the rights and powers of said Isaac Rosenfield hereunder.

Third: It is the agreement and intention hereof that under no conditions or circumstances shall the Trustee acquire absolute beneficial ownership of any of the corpus, incomes, issues or choses in action hereunder or in connection herewith, but that this instrument and the provisions hereof shall be and be construed to be entirely for the benefit and protection of the Donor and the objects of his bounty and solicitude as herein set forth. In the event that at any time, whether under any of the provisions hereof or by act or operation of law or otherwise, it should be deemed or construed that there should vest in the said Trustee any beneficial ownership or enjoyment whatsoever of said corpus, principal, interest, dividends, incomes or issues, or any part thereof, then said fund or monies whether principal or incomes shall be paid over absolutely to the Donor, and in the event that he shall not then survive, then to such persons in such amounts as they would be entitled thereto in the event of the death intestate of the Donor possessed of the absolute title thereto under the laws existing in the State of New York at the date of the execution hereof.

Fourth: During the lifetime of Isaac Rosenfield above named, but not beyond the lifetime of the said Audrey Louise Hollander and Noel Ruth Hollander, the said Isaac Rosenfield shall have the

sole right and power to invest or direct the investment of any and all funds and assets forming the principal and corpus of said trust estate and any trust hereunder, and to change or direct
12 the change of the investment thereof, and to sell, exchange, or otherwise dispose of any present or future securities or valuables or any part thereof, and to substitute the proceeds thereof or direct such substitution, or to purchase or otherwise substitute for such securities and assets as are disposed of, securities, money or assets, including notes, whether secured or unsecured, procured with said proceeds, or to direct the same with absolute discretion to said Isaac Rosenfield as to the nature of said investments and reinvestments and without regard to whether the existing or any substituted investments are such as are legal for the investment of trust funds for trustees. The Trustee shall not be liable for any loss from any sale, investment or reinvestment made at the direction of the said Isaac Rosenfield, and is hereby released from any and all liability and responsibility by reason of any such sale, investment or reinvestment so made at the request of the said Isaac Rosenfield or by reason of any loss, depreciation or matter arising by reason thereof. After the death of the said Isaac Rosenfield the Trustee shall be authorized to retain, without any liability for so doing, any assets then constituting the principal of the trust fund, and to sell, invest and reinvest the same without being limited to the securities in which trustees are authorized to invest trust funds.

Fifth: All rights or privileges issued or accruing in connection with any securities held in said corpus or fund, including rights or privileges to subscribe for other or additional stock or securities, shall be sold and disposed of and the proceeds thereof, if legal and not in contravention of any law against undue accumulation, shall be regarded as and added to the principal or corpus of
13 said fund. In the event, however, that the said rights or privileges shall be to purchase, acquire or invest in any securities and should not be sold, then said rights and privileges may be availed of and purchases made thereunder at the direction of the said Isaac Rosenfield and after his death in the discretion of the Trustee if funds are available for such purpose. At the direction of the said Isaac Rosenfield and after his death in the discretion of the Trustee, and so far as concerns securities in its hands in this trust, the Trustee may enter into plans of reorganization, deposit securities in connection therewith, and pay levies out of the principal of this trust, and may, at the direction of said Isaac Rosenfield, and after his death at the discretion of the Trustee, mortgage, lease, release, improve, alter, exchange and convey any real estate that may at any time form the corpus of any trust hereunder and may for such purposes use the principal of said

corpus so far as necessary, but the said Trustee shall not exchange securities for real estate, nor invest funds of any said trust in real estate, but may acquire real estate in foreclosure of any mortgage that may form a part of any trust hereunder.

All disbursements of principal or capital that may be made upon or by virtue of any securities held by the Trustee hereunder, as well as any and all stock dividends or distributions of scrip or securities of whatever kind in addition to the usual dividend disbursements, shall, if legal and not in contravention of any law against undue accumulation, be considered and treated as capital and added to the corpus of the funds so held by the Trustee hereunder and shall not be disbursed as income to the beneficiaries.

Sixth: Upon the termination of any trust hereunder the
14 principal or any part thereof to be turned over and distributed may be so paid by the Trustee in kind and without sale of the securities forming the corpus thereof, and the properly exercised discretion of the Trustee as to the value of the securities so paid over and transferred shall be sufficient and conclusive.

Seventh: It is expressly agreed that there is no obligation upon the Trustee or any person to set up or maintain any sinking fund or other fund as against possible depreciation of the corpus of this estate or securities therein or to amortize the same whether purchased at a premium or otherwise.

Eighth: The said Donor shall have the right to direct in writing at any time the transfer of any of the corpus, principal or securities herein to any branch of the Trustee, irrespective of whether such branch is in the State of New York or in any foreign state or country, but at the expense either of the principal or income as the Trustee may deem proper.

Ninth: Said Donor shall have the right to add any funds, valuables, securities, property, real or personal, or choses in action to, or otherwise to increase said corpus or principal of, this trust or any trust or fund hereunder at any time, and any such additions as well as any monies, securities or things substituted for or purchased from or being the proceeds of the corpus of this trust shall at once become subject to all the terms and conditions hereof. The said Trustee is, however, hereby released from any and all responsibility or liability by reason of the retention by it of any assets at any time turned over to it by the Donor and by reason of any depreciation or other loss which may occur in connection therewith.

15 Tenth: Nothing herein contained shall limit or take away from the absolute right of the Trustee to enter into any reorganizations, mergers or consolidations, or into agreements looking to such purposes, excepting in so far as exclusive powers

of investment or direction may be given to the said Isaac Rosenfield hereunder.

Eleventh: The Trustee shall have the right further to resign this trust and to be relieved from all obligations hereunder upon thirty days' written notice to the Donor, or upon his death to the living beneficiaries hereunder.

Twelfth: The compensation of the Trustee shall be one percent (1%) upon the incomes received and disbursed by it annually. Upon and at the time of the paying over of the principal or corpus of any fund hereunder, however, the Trustee shall be entitled to receive the commissions allowed by law to trustees in the State of New York upon such principal. The Trustee shall not, however, be entitled to extra commissions or commissions upon principal upon the setting up of any additional trusts or the division into smaller trusts hereunder. Expenses necessarily and reasonably incurred by the Trustee in connection with the trust shall be reimbursed to it and may be chargeable first only against the income and then against the corpus, but not against the Donor or any beneficiary personally. The Trustee shall, however, advise the Donor by letter prior to its incurring expenses greater in amount than Five Hundred Dollars ($500).

Thirteenth: No beneficiary hereunder shall have the right to anticipate, mortgage, pledge, hypothecate, encumber or assign any interest hereunder, whether of income, corpus or remainder. In the event of the bringing of any judgment-creditors' action or proceeding, or any action or proceeding of like character, for the purpose of reaching the interest of any beneficiary hereunder, whether in income, corpus or remainder, and/or of sequestering it and/or preventing the absolute paying over and actual use and enjoyment thereof, unimpaired, by such beneficiary, and/or of diverting it from the purposes and objects contemplated by the Donor as herein set forth, and in the event that any order, decree, judgment or relief be obtained or issued by any court against any beneficiary to that effect, then from that event or from the date of the issuance of such order, decree, judgment or relief, all income, and any right, title and interest of said beneficiary hereunder shall at once cease and the Trustee shall thereupon convey and pay over any such incomes or remainder and all such right, title and interest and shall thereupon dispose of and treat any corpus to which such beneficiary was theretofore entitled or in which such beneficiary had any interest as though such beneficiary were dead.

Fourteenth: If it be held that any of the provisions of this instrument are illegal or contrary to law, then the remaining legal provisions shall be enforced and given effect as though the parts so held to be illegal were not contained herein or were an imma-

terial part hereof, providing, however, that the cancellation or non-enforcement of any such illegal provisions does not materially change or destroy the scope, effect and intention of this instrument. For the purposes of construing this instrument, the words "beneficiaries," "children" or "issue" shall in no case include or be held to mean or refer to any adopted child, and no adopted child shall be entitled to or take any benefit hereunder.

17 Fifteenth: All income accrued on any securities at the time of delivery to the Trustee hereunder by the Donor shall be treated as income and not as principal.

In witness whereof the Donor has hereunto set his hand and seal and the Trustee has hereunto affixed its corporate seal and caused this instrument to be executed by its duly authorized officer the day and year first above written.

[L. S.]

LESTER ROSENFIELD,
By ISAAC ROSENFIELD,
Atty. in fact.

In the presence of:
BARNETT L. HOLLANDER.

[SEAL]

BANKERS TRUST COMPANY,
HENRY J. COCHRAN,
Vice President.

Attest:
C. C. PRICE,
Asst. Trust Officer.

18 STATE OF NEW YORK,
County of New York, ss:

On the 8th day of June, nineteen hundred and twenty-two, beforeme came Isaac Rosenfield, to me known to be the attorney in fact of Lester Rosenfield, the individual described in and who by his said attorney in fact executed the foregoing instrument, and duly acknowledged before me that he executed the same as the act and deed of Lester Rosenfield, therein described, and for the purposes therein mentioned, by virtue of a power of attorney duly executed by the said Lester Rosenfield.

[NOTARY SEAL]

L. VAN NEST,
Notary Public, Bronx County.

Clerk's No. 2. Register's No. 6. New York Co. Clerk's No. 31, Register's No. 3037. Commission expires March 30, 1928.

STATE OF NEW YORK,
County of New York, ss:

On this 8th day of June, 1922, before me personally came H. J. Cochran, to me known, who, being by me duly sworn, did depose

and say that he resides in Plainfield, New Jersey; that he is Vice President of the Bankers Trust Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[NOTARY SEAL] L. VAN NEST,
Notary Public, Bronx County.

Clerk's No. 2. Register's No. 6. New York Co. Clerk's No. 31. Register's No. 3037. Commission expires March 30, 1928.

RE-EXECUTION.

19 In witness whereof the Donor has hereunto set his hand and seal and the Trustee has hereunto affixed its corporate seal and caused this instrument to be executed by its duly authorized officer the day and year first above written.

[L. S.] LESTER ROSENFIELD.

In the presence of:
J. F. FREENEY.

UNITED STATES CONSULATE GENERAL,
City of Paris, Republic of France, ss:

On this 19th day of June 1922 before me personally came Lester Rosenfield to me known and known to me to be the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

JOHN F. FREENEY,
Vice-Consul of the United States of America at Paris, France.
6883

American Consulate General Seal, Paris, France.
American Consular Service, $2.00 Fee Stamp, Cancelled.
American Consulate General, June 19, 1922, Paris, France.

20 *Exhibit 2, annexed to foregoing statement of facts*

I, Lester Field, a citizen of the United States, having my domicile in the City of New York, and residing in the City of Paris, Republic of France, being of sound mind and disposing memory, mindful of the uncertainty of human life, and being desirous of disposing of all of my property of whatsoever nature and whereso-

ever situate, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all last wills and Testaments and codicils thereto heretofore by me made.

First: I direct the payment of all my just debts and funeral expenses as soon after my death as practicable.

Second: I give and bequeath all my personal apparel, jewelry, furniture, household furnishings, paintings and motor cars to my beloved wife, Blanche Field, outright, absolutely and forever.

Third: I direct that, in accordance with the provisions of a deed of trust dated the eighth day of June, nineteen hundred and twenty-two, entered into between the Testator herein and the Bankers Trust Company of New York City, there be set aside the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, to be held in trust, the entire income therefrom to be paid to my wife during her life.

Fourth: I direct that all the rest, residue and remainder of my estate of whatsoever kind and nature, and wheresoever situate, whether real, personal or mixed property, whereof I may die seized or possessed or to which I may be in any manner entitled, or as to which or in respect of which I may have any power of appointment, be disposed of as follows:

21 A. I direct that my executors convert my property into cash or marketable securities of any kind or nature whatsoever as soon as practicable after my decease and that the said monies and securities comprising said residue of my estate be deposited with the Bankers Trust Company of New York City to constitute two trust funds, designated and described as follows:

I. The first trust, hereinafter called the Lagarde Trust, for the benefit of my dear friend, Juilliet Lagarde, a resident of the City of Paris, with the following terms and conditions:

(a) The Trust fund shall consist of the sum of Forty Thousand ($40,000.00) Dollars, in cash or securities.

(b) The Trustee of said Trust fund shall be the Bankers Trust Company of the City of New York.

(c) The Trustee shall have full discretion as to the kinds and types of investments to make and as to when the securities held in the trust shall be sold or retired, limited however, to statutes governing administration of trust property.

(d) The Trustee shall hold the securities and other property under its control during the lifetime of Juilliet Lagarde.

(e) The Trustee shall pay to the said Juilliet Lagarde the entire income of the Trust during her lifetime.

(f) Upon the death of the said Juilliet Lagarde, the Trustee shall pay over the entire property comprising the said Trust fund

to the trustee of the Blanche Rosenfield Trust, and the
22 property so paid over shall become merged with the property then in the Blanche Rosenfield Trust and be there kept and administered under the same terms and conditions governing the administration of the original Blanche Rosenfield Trust.

(g) Should my wife pre-decease the said Juilliet Lagarde then upon the death of the said Juilliet Lagarde, I direct that the Trustees shall pay over the entire property comprising the said Lagarde Trust to my natural heirs as designated in the Trust Document held by Bankers Trust Co.

II. The second trust, hereinafter called the Blanche Rosenfield Trust, to be for the benefit of my beloved wife, Blanche Rosenfield, a resident of the City of Paris, with the following terms and conditions:

(a) The trust shall comprise all the rest, residue and remainder of my estate, in excess of the $40,000.00 set aside for the Lagarde Trust.

(b) The Trustee of said Blanche Rosenfield Trust shall be the Bankers Trust Company of the City of New York.

(c) The Trustee shall have full discretion as to the kinds and types of investments to make and as to when the securities held in the Trust shall be sold or retired, limited however to the statutes governing administration of Trust property.

(d) The Trustee shall hold the securities and other property of the Trust under its control during the lifetime of my wife, Blanche Rosenfield.

(e) The Trustee shall pay to my wife the entire income of the Trust during her lifetime.

23 (f) Upon the death of my wife, the Trustee shall pay over the entire property comprising the said Trust to my natural heirs as designated in the trust document held by Bankers Trust.

Fifth: Provided always that the terms of this Will or any provision herein made for the benefit of my wife, Blanche Rosenfield, shall be effective only if, in the event of my death, we shall still be husband and wife. It is my intention, and I direct, that should our marriage relationship be terminated before my death, any provisions made herein for the benefit of my wife be considered null and void and of no effect, the same as if she had predeceased me.

Sixth: Should I die outside of the United States, it is my desire that the laws of New York State govern the administration of this my Last Will and Testament and any property disposed of hereunder.

Seventh: I hereby nominate and appoint as executors of this my Last Will and Testatment, Abraham Kraditor and Barnett L.

Hollander, or their survivor, or any of them as may qualify, and hereby empower my said executor or executors, as the case may be, to grant, bargain, sell, convey and dispose of any lands or property, real or personal, whereof I may die seized or possessed and to execute and deliver all proper instruments of conveyance therefor, to mortgage, lease or sub-lease any and all of my said estate, and otherwise deal with the same as though it were his or their sole property. My said executor or executors shall not be required to give any bond for the due and faithful performance of
24 his or their duties hereunder. I further direct that my said executors, the survivor or survivors of them, shall not be personally responsible for any loss that the estate may suffer due to the purchase or sale by them of any securities or properties in accordance with the directions of this my Last Will and Testament.

In witness whereof I have hereunto subscribed my name and set my seal at the end hereof, in the City of New York this sixth day of August in the year nineteen hundred and thirty-one.

Revised Sept. 29, 1933.

[L. S.]

LESTER FIELD.

25 In the Tax Court of the United States

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 110585. Promulgated June 2, 1943

On June 8, 1922, decedent transferred property in trust, in all of which he retained a possibility of reverter until his death. He died on November 16, 1937. **Held**, the measure of the decedent's estate for estate tax purposes includes the value of the entire trust corpus at his death. Sec. 302 (c), Revenue Act of 1926, as amended by sec. 803 (a), Revenue Act of 1932; Helvering *v.* Hallock, 309 U. S. 106; Smith *v.* Shaughnessy, — U. S. — (Feb. 15, 1943).

Sydney J. Schwartz, Esq., for the petitioner.

J. C. Maddox, Esq., for the respondent.

Opinion

LEECH, Judge: Respondent determined a deficiency of $4,782.82 in estate tax by, inter alia, including in the value of decedent's estate the entire value of the corpus of an inter vivos trust created by the petitioner's decedent in 1922. Petitioner asks a finding of an overpayment of $25,684.23. The propriety of that action of

respondent is the only issue here. The estate tax return was filed with the collector for the second district of New York.

The facts were stipulated and are so found.

Decedent died on November 16, 1937, at the age of 52 years.

On June 8, 1922, he transferred to Bankers Trust Co., as
26 trustee, certain assets valued at the date of his death at the sum of $307,452.82, which value was included by respondent in decedent's estate in computing the present deficiency.

Summarized, the terms of this trust were:

A. The trust is to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under F, infra.

B. The income is to be paid to decedent for his life unless the trust terminates before his death.

C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all, is to be held in trust for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each.

D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced).

E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue.

F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus
27 is to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving, if none, then to decedent's brother or sister or their issue.

G. Upon the death of the widow, the corpus of the trust created for her benefit is to go to the issue of decedent surviving, but if none, then to the brother or sister or their issue.

H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent.

I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death decedent was survived by his two nieces, whose lives were to measure the maximum life of the trust, and they were then of the age

of 18 and 25 years, respectively. He was also survived by his widow, Blanche Field, by his sister, Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield.

The transfer in trust was not made in contemplation of death, nor did deceased at any time relinquish any power to alter, amend, or revoke the transfer or to change the enjoyment of the property transferred in contemplation of death.

It is conceded by the petitioner that the value of the corpus of the trust to the extent of $150,000, directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling it in its entirety. The value of a remainder in the
28 sum of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18.

Petitioner concedes that the value of the trust remainder, to the amount of the $150,000 allocable by decedent to the trust for the widow, was properly included for estate tax purposes under section 302 (d) of the Revenue Act of 1926, as amended. The issue here therefore is whether respondent was correct when he included the balance of that remainder for those purposes. Respondent supports his action of including the entire value of the remainder upon three grounds: (1) under section 302 (c) of the Revenue Act of 1926, as amended by section 803 (a) of the Revenue Act of 1932, as construed by Helvering v. Hallock, 309 U. S. 106, and other cases; (2) under section 302 (d) of the Revenue Act of 1926, as amended by section 401 of the Revenue Act of 1934; and (3) decedent died owning outright that part of the trust corpus which exceeded the $150,000 allocable therein to the trust for the widow.

In opposing the first above contention, petitioner concedes that decedent, by the trust deed, reserved a possibility or reverter in the trust remainder until his death, in that, if he survived his two nieces whose lives measured the maximum life of the trust, its entire corpus would revert to him. Its position, however, is that only the value of that possibility of reverter, which is here stipulated, can be included in the value of decedent's estate at his death for estate tax purposes. It also cites the Hallock as well as other cases.

Whatever may have been said[1] about the uncertainty of
29 the law on the point thus raised prior to the decision of the Supreme Court in *Smith* v. *Shaughnessy*, — U. S. — (Feb. 15, 1943) (see also *Robinette* v. *Helvering*, — U. S. — (Feb. 15, 1943)), we think the decision in the *Shaughnessy* case definitely concludes the petitioner here.

It is true that case involved only gift tax. The sole controversy, however, there as here was whether the measure of such tax included the value of the remainder of an inter vivos trust created by the donor similar for present purposes to that now before us. The Supreme Court there pointed out that the principal contention of the taxpayer was that the value of such remainder was not includible in the value of the gift for gift tax purposes because it would be later includible in the value of the estate of the donor for estate tax purposes under the Hallock case, supra, and that thus subjecting it to both an estate and gift tax would be contrary to the policy announced by the Supreme Court in Estate of Sanford v. Commissioner, 308 U. S. 39. The Court then proceeded to say:

This view, we think, misunderstands our position in the Sanford case. As we said there, the gift and estate tax laws are closely related and the gift tax serves to supplement the estate tax. We said that the taxes are not "always mutually exclusive," and called attention to § 322 of the 1924 Act there involved (re-enacted with amendments in § 801 of the 1932 Act) which charts the course for granting credits on estate taxes by reason of previous payment of gift taxes on the same property. The scope of that provision we need not now determine. It is sufficient to note here that Congress plainly pointed out that "some" of the "total gifts subject to gift taxes * * * may be included for estate tax purposes and some not." House Report No. 708, 72d Cong., 1st Sess., p. 45.
30 Under the statute the gift tax amounts in some instances to a security, a form of down-payment on the estate tax which secures the eventual payment of the latter; it is in no sense double taxation as the taxpayer suggests.

We conclude that under the present statute, Congress has provided as its plan for integrating the estate and gift taxes this system of secured payment on gifts which will later be subject to the estate tax.

Unencumbered by any notion of policy against subjecting this transaction to both estate and gift taxes, we turn to the basic question of whether there was a gift of the remainder. * * *

We think it is inherent in this expression of the Supreme Court that the remainder of such a trust may be not only subject to gift tax, as was there decided, but is also subject to the estate tax con-

[1] Paul, Federal Estate and Gift Taxation, sec. 7.25, ch. 7, vol. I.

tested here. It may be that the amount of a gift tax paid upon an inter vivos transfer which included in its measure the value of the remainder would be credited against a later estate tax. But, under the quoted decision, that tax is the principal—the inclusive tax. It stands up on its own feet and is measured by its own standards, which are not affected by those of the gift tax. Thus because there was no "down-payment on the estate tax," in the form of a gift tax, as here,[2] the estate tax is not reduced in any degree.

The question of whether the measure of the value of the remainder includible here at decedent's death for estate tax purposes should exclude the value of any life estate to his issue is moot, since decedent died without ever having had issue and thus no life estate, following his own, arose. Respondent is therefore affirmed on the submitted issue.

This decision renders unnecessary any consideration of respondent's second and third positions.

Decision will be entered under Rule 50.

31 In The Tax Court of the United States

Docket No. 110585

Respondent's computation for entry of Decision

Filed January 21, 1943

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
E. C. ALGIRE,
Division Counsel.
JAMES C. MADDOX,
Special Attorney,
Bureau of Internal Revenue.

Without prejudice to the right of appeal as provided by
32 law I agree that the attached computation is in accordance

[2] There was no gift tax during 1922 when the transfer in trust was made here.

with the opinion of the Tax Court of the United States in the above-entitled appeal.

EDGAR L. BERNHEIMER,
Counsel for Petitioner.

Audit Statement

C:TS:NYD—Recomp.
JFP:FJG

In re: Estate of Lester Field, Barnett Hollander, Temporary Administrator, c/o Hollander & Bernheimer, 3 South William Street, New York, New York.

Docket: #110585.

Date of death: November 16, 1937.

Liability	*Assessed*	*Deficiency in assessment and payment*
$41,770.67	$41,209.84	$560.83

Recomputation of tax liability prepared in accordance with decision of The Tax Court of the United States promulgated June 2, 1943.

Credit for State taxes under the provisions of Section 301 (b) of the Revenue Act of 1926, as amended by Section 802 (a)
33 of the Revenue Act of 1932, and limited by Section 402 (a) of the latter Act, has been allowed against the gross basic tax liability on the basis of the credit evidence on file.

Adjustment to Net Estate

	For basic tax	*For additional tax*
Net estate shown in deficiency letter dated January 16, 1942	$236,963.28	$296,963.28
Addition:		
(a) Accrued income to the date of death on trust created by the decedent on June 8, 1922	3,338.36	3,338.36
Adjusted net estate	$240,301.64	$300,301.64

34 Explanation of Adjustment

(a) The amount of $3,338.36 representing accrued income to the date of death of a trust created by the decedent on June 8, 1922 is included in the gross estate. (Stipulation of facts, paragraph 11, page 4.)

A credit of $4,889.66 is allowed for State estate taxes. (Stipulation of facts, paragraph 4, page 3.)

Computation of Estate Tax

Net estate for basic tax		$240,301.64
Net estate for additional tax		$300,301.64
Gross basic tax		$ 6,112.07
Credit for estate and inheritance taxes		4,889.66
Net basic tax		$ 1,222.41
Total gross taxes (basic and additional)	$46,660.33	
Gross basic tax	6,112.07	
Net additional tax		40,548.26
Total net basic and additional taxes		$ 41,770.67
Tax assessed:		
Original, April 1939 list, page 104, line 4	$14,638.89	
Additional, Oct. 1940 list, page S 190, line 12	26,570.95	
Total assessed		41,209.84
Deficiency of estate tax		$560.83

35 Statement of Account

C:TS:NYD—Recomp.
JFF:FJG

In re: Estate of Lester Field. Barnett Hollander, Temporary Administrator, c/o Hollander & Bernheimer, 3 South William Street, New York, New York.

Docket: #110585.

Date of death: November 16, 1937.

Estate tax liability		$41,770.67
Estate tax assessed:		
Original, April 1939 list, page 104, line 4	$14,638.89	
Additional, Oct. 1940 list, page S 190, line 2	26,570.95	41,209.84
Deficiency in assessment		$560.83
Estate tax liability		$41,770.67
Estate tax paid:		
April 18, 1939	$14,638.89	
December 23, 1940	26,570.95	41,209.84
Deficiency in payment		$560.83

36 In The Tax Court of the United States

Washington

Docket No. 110585

Decision

Pursuant to the Opinion of the Court promulgated June 2, 1943, the parties hereto having filed on June 21, 1943, an agreed computation, it is, therefore,

Ordered and decided: That there is a deficiency in estate tax in the amount of $560.83.

Enter:

(Signed) J. RUSSELL LEECH,
Judge.

Entered, June 23, 1943.

37 In United States Board of Tax Appeals

Docket No. 110585

**Statement of evidence **

(Lodged Sept. 28, 1943; Filed Oct. 8, 1943)

The above-entitled proceeding came on for hearing on the 23rd day of February, 1943, before the Hon. J. Russell Leech, Judge of the Tax Court of the United States at New York, N. Y., pursuant to notice of hearing theretofore given whereupon the following proceedings were had, to wit:

Appearances: Edgar J. Bernheimer, Esq. (1 South William St., New York, N. Y.), appearing on behalf of the Petitioner, by Sydney J. Schwartz, Esq., of Counsel. James C. Maddox, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, the Respondent.

Proceedings

Mr. Schwartz made a statement of the case on behalf of the petitioner and moved to amend the amended petition.

Mr. Maddox stated that there was no objection to the amendment on the part of the respondent and stated that
38 respondent did not want to file an answer to the present amendment but requested that the record show a general denial thereof. Thereupon the Court granted the motion for leave to amend as follows:

"Judge LEECH: The motion is granted. The record will show the filing of the amendment to the amended petition, service of a copy of the same on respondent and the entry of a general denial by the respondent."

Mr. Schwartz offered a stipulation of facts which was thereupon filed and became part of the record. Mr. Maddox thereupon presented an opening statement for the respondent and the Court made rulings as follows:

"Judge LEECH: The Court will rule now on the objection which we understand is as to the materiality, relevancy, and competency of Paragraphs 12 and 13 of the stipulation. The objection is overruled with an exception to the respondent.

"Mr. MADDOX: I think Mr. Schwartz pretty well covered the position of the respondent on the first issue. The respondent has included the full amount of the property, that is, the value of the property at the date of death that was transferred in trust on the grounds it was a transfer intended to take effect in possession and enjoyment at or after death.

"Judge LEECH: And therefore included at its same value.

"Mr. MADDOX: That is true. Under the Hallock case by reason of the fact that the gift after the life estate was retained in the grantor, was subject to the contingency of his death; if he survived the termination of the trust, the property would revert to him and by reason of that reverter the transfer comes within the principle of the Hallock case.

39 "There is also the other position, alternative position of the respondent that petitioner had the power to appoint this property. The petitioner says that power never came into being because he never had issue. The power was conditioned upon the decedent having issue. Respondent says that that makes no difference, that the possibility of having issue continued up to the time of his death and there are cases to the effect that conditions precedent do not prevent the property going into the gross estate, which will be fully covered in the brief.

"There are two other issues besides this trust issue, that Mr. Schwartz did not mention but perhaps I should.

"There is one item of the income that accrued to the decedent as of the date of his death. The respondent included an amount of $207.51 in the notice of deficiency. It was later determined that amount should have been $3,545.87. There is an agreement now between the parties that the gross estate should be increased by the difference, $3,338.36. That is covered by stipulation.

"There is also the question of credit for estate taxes. The stipulation covers that issue also. The amount paid is stipulated and the amount because of the second issue I mentioned, is indeterminate until we make a computation and there will perhaps be a necessity in any event making computation under Rule 50 and the

credit will be adjusted at that time. I have no further statement.

"Judge LEECH: Simultaneous original briefs on April 14 and reply briefs on May 3rd, 1943."

40 True copies of the stipulation of facts hereinabove referred to and the amendment to the amended answer have been heretofore filed and are made a part of this statement of evidence as if fully set forth herein. Petitioner tenders and presents the foregoing as his statement of evidence in this case and prays that the same may be approved by the Tax Court of the United States and made a part of the record in this cause.

EDGAR J. BERNHEIMER,
Attorney for Petitioner.

Approved Oct. 7, 1943.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent on Review.

Approved and ordered filed this 8 day of Oct. 1943.

J. RUSSELL LEECH,
Judge.

41 In United States Circuit Court of Appeals

For the Second Circuit

No. 202—October Term, 1943.

(Argued June 13, 1944. Decided July 13, 1944)

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Before AUGUSTUS N. HAND, CHASE and FRANK, Circuit Judges.

Petition of taxpayer for review of a decision of the Tax Court of the United States, reported in 2 T. C. 21. Reversed and remanded.

Edgar J. Bernheimer (Sydney J. Schwartz of counsel), for petitioner. Samuel O. Clark, Jr., Sewall Key, Helen R. Carloss, and Robert Koerner, for respondent.

42 The facts as stipulated and found by the Tax Court are as follows:

Taxpayer's decedent died on November 16, 1937, at the age of 52. On June 8, 1922, he transferred to Bankers Trust Company,

as trustee, certain assets valued at the date of his death at the sum of $307,452.82. This value was included by the Commissioner in decedent's estate in computing the present deficiency. Summarized, the terms of this trust are:

A. The trust is to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under F, *infra*. B. The income is to be paid to decedent for his life unless the trust terminates before his death. C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all is to be held in trust, for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each. D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced). E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue. F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus is to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving, if none, then to decedent's brother or sister or
43 their issue. G. Upon the death of the widow, the corpus of the trust created for her benefit is to go to the issue of decedent surviving, but if none, then to the brother or sister or their issue. H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent. I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death, he was survived by his two nieces, whose lives were to measure the maximum life of the trust, and they were then of the age of 18 and 25 years, respectively. He was also survived by his widow, Blanche Field, by his sister, Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield.

The transfer in trust was not made in contemplation of death, nor did deceased at any time relinquish any power to alter, amend, or revoke the transfer or to change the enjoyment of the property transferred in contemplation of death.

It is conceded by the taxpayer that the value of the corpus of the trust, to the extent of $150,000 directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling it in its entirety. The value of a remainder in the sum of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,562.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18.

44 The Tax Court sustained the Commissioner's determination of deficiency, holding that the value of the entire corpus of the trust at decedent's death, $307,452.82, was properly included in the gross estate.

Opinion

FRANK, Circuit Judge: In Helvering v. Hallock, 309 U. S. 106, 111, the Court said that "the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." Precisely what that means has been a matter of much comment.[3] We do not agree with the Tax Court that Smith v. Shaughnessy, 318 U. S. 176, which dealt with a gift tax, aids decision here. Whatever we might now hold if this were for us a novel question, we need not consider, for the matter is governed in this circuit by our decisions in Commissioner v. Flanders, 111 F. (2d) 117 (C. C. A. 2) and Bankers Trust Co. v. Higgins, 136 F. (2d) 477 (C. C. A. 2). Accordingly we hold that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life estates of his two nieces. The resulting taxable value here is $24,930.76. We reverse with directions to the Tax Court to fix the tax on that value.

Reversed and remanded.

[3] See Paul, Federal Estate and Gift Taxation, Sec. 7.25.

45 In the United States Circuit Court of Appeals
Second Circuit

ESTATE OF LESTER FIELD, DECEASED, ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from The Tax Court of the United States

Judgment

Filed August 1, 1944

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and cause remanded to The Tax Court of the United States for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

46 (File endorsement omitted.)

47 (Clerk's certificate to foregoing transcript omitted in printing.)

48 Supreme Court of the United States

Order allowing certiorari

Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Fidelity-Philadelphia Trust Company et al. vs. Rothensies, No. 263.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[File endorsement on cover.] File No. 49031. U. S. Circuit Court of Appeals, Second Circuit. Term No. 578. Commissioner of Internal Revenue, Petitioner vs. Estate of Lester Field, Deceased, Barnett Hollander, Temporary Administrator and Executor. Petition for a writ of certiorari and exhibit thereto. Filed October 10, 1944. Term No. 578 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944